RE RINDAYA WOOD PROCESSING SDN BHD, EX P KENNETH TEH AH KIAM & ANOR

HIGH COURT SABAH & SARAWAK, SIBU
CLEMENT SKINNER J
[ORIGINATING SUMMONS NO: 24-160-2001]
23 MAY 2002

LAND LAW: *Charge - Sale of charged land - Sale by debenture of land charged under Land Code (Cap 81) (Sarawak) - Rights of chargor under ss. 145-153 of Land Code (Cap 81) (Sarawak) - Whether could be waived - Whether could be contracted out of by chargor - Land Code (Cap 81) (Sarawak), ss. 145-153*

LAND LAW: *Charge - Sale of charged land - Sale by debenture of land charged under Land Code (Cap 81) (Sarawak) - Whether receivers and managers empowered to sell land on behalf of chargor without resorting to procedures under Land Code (Cap 81) (Sarawak) - Whether against public policy*

This was an application by the receivers and managers (appointed by Bank Utama (Malaysia) Bhd ('the bank') pursuant to a power contained in a debenture and four supplementary debentures made between Rindaya and the bank) of Rindaya Wood Processing Sdn Bhd ('Rindaya') seeking a declaration that they have the power and authorisation under the terms of the aforementioned debentures to offer for sale all Rindaya's right title share and interest in four parcels of land ('the said land'), even though the said lands had been charged to the bank and such charges had been registered under the provisions of the Land Code (Cap 81) (Sarawak) ('the SLC'). In the alternative, they sought a declaration that Rindaya, acting through the receivers and managers as its authorised agents, had the power to offer for sale and sell the said land even though the said land was subject to various memoranda of charge in favour of the bank, registered under the SLC.

Held:

[1] Applying the reasoning in the Supreme Court case of *Kimlin Housing Development Sdn Bhd v. Bank Bumiputra (M) Bhd*, it must follow that the provisions found in ss. 145-153 of the SLC which confer certain valuable rights on chargors and which set out the rights and remedies of parties under a statutory charge under the SLC are there to serve more broad public purposes as opposed to the exclusively personal rights of a chargor and, therefore, cannot be waived nor can a chargor contract

himself out of the relevant provisions of the SLC so as to defeat that purpose. Therefore, the question of substance which was raised in this application must be decided against the receivers and managers, which was, relying on the provisions in the debentures, they did not have the power and authority to sell the said land without resorting to the procedure prescribed in the SLC. (p 298 c-g)

[2] The receivers and managers were not entitled to their alternative declaration as any attempt by a chargor of land under the SLC to confer a right of sale under a debenture on receivers and managers, without taking proceedings under the SLC to obtain a judicial sale, would be void on the ground of public policy as an attempt to contract out of the rights conferred by the SLC. The sale would not have been allowed because public policy demanded that the chargor be protected from his own deeds. (pp 298 h & 299 c-e)

[Application dismissed.]

Case(s) referred to:

Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd [1996] 2 CLJ 561 ***(refd)***

Kimlin Housing Development Sdn Bhd v. Bank Bumiputra (M) Bhd [1997] 3 CLJ 274 ***(foll)***

M & J Frozen Food Sdn Bhd v. Siland Sdn Bhd & Anor [1994] 2 CLJ 15 ***(refd)***

Malayan Banking Berhad v. Kueh Siew Pin [2001] 6 CLJ 446 ***(refd)***

Melantrans Sdn Bhd v. Carah Enterprise Sdn Bhd (In Receivership) & Anor [2000] 3 CLJ 127 ***(dist)***

Sheno Paper Industries Sdn Bhd v. Pacidunia Sdn Bhd [2000] 1 CLJ 320 ***(foll)***

Legislation referred to:

National Land Code, ss. 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265

Land Code (Cap 81) (Sarawak), ss. 143, 145(1), 146, 147, 148(1), (2), 149, 150(1), 151, 152, 153

For the plaintiff - Stephanie G Chin; M/s Alvin Chong & Partners

Reported by Suresh Nathan

JUDGMENT

Clement Skinner J:

This is the hearing of an originating summons taken out on an *ex parte* basis by Mr Kenneth Teh Ah Kiam and Mr Gong Wee Ning, both of the accounting firm of Pricewaterhouse Coopers, Kuala Lumpur, who were appointed as the joint and several receivers and managers (hereafter "the receivers and managers") of a company incorporated in Malaysia known as Rindaya Wood

Processing Sdn Bhd (hereafter "Rindaya"). Their appointment was made by Bank Utama (Malaysia) Berhad (hereafter "the bank") pursuant to a power to do so contained in a debenture made between Rindaya and the bank on 6 January 1992 and four supplementary debentures dated 14 June 1994, 31 December 1994, 7 March 1997 and 7 March 1997 respectively.

By this summons, the receivers and managers seek the following orders:

(a) a declaration that they have the power and are authorised under the terms of the aforementioned debentures to offer for sale and to sell all Rindaya's right title share and interest in four parcels of land known as Lot 237, Lot 238, Lot 239 and Lot 240, Block 9 Sibu Town District (hereafter 'the said lands') even though the said lands have been charged to the bank and such charges have been registered under the provisions of the Sarawak Land Code (Cap. 81) (hereafter 'the SLC');

(b) that they are authorised to sign all documents and/or memoranda of transfer and to do all necessary acts for the purpose of effecting the sale and transfer of the said lands;

In the alternative,

(c) a declaration that Rindaya, acting through the receivers, its authorised agents has the power to offer for sale and sell the said lands even though the said lands are subject to various memoranda of charge in favour of the bank, registered under the SLC;

(d) that Rindaya acting through its authorised agents is authorised to sign all documents and/or memoranda of transfer and to do all necessary acts for the purpose of effecting the sale and transfer of the said lands.

The facts leading up to this summons are these. On 16 January 1991, Rindaya, whose principal activity is the manufacturing and marketing of plywood, executed two memoranda of charge under the SLC over the said lands in favour of the bank which were duly registered at the Sibu Land Registry Office as Instrument No. L1000/1991 and No. L1001/1991 respectively. The memoranda state that the charges were created to secure banking facilities of RM1,500,000 and RM600,000 respectively, granted by the bank to Rindaya.

About one year later, on 6 January 1992, Rindaya executed a debenture in favour of the bank to secure banking facilities in the sum of RM50,000,000 (hereafter 'the first debenture'). Pursuant to the said debenture, Rindaya created a fixed charge over the said lands under the SLC, in favour of the bank which was registered at the Sibu Land Registry Office on 30 March 1992 as Instrument No. L.8718/1992.

In 1994 the banking facilities granted to Rindaya were increased by a further sum of RM10,000,000 for which Rindaya executed a second debenture in favour of the bank on 14 June 1994. In the same year the facilities offered to Rindaya were increased by a further RM10,000,000 for which Rindaya executed a third debenture in favour of the bank on 31 December 1994. Subsequently, Rindaya executed two supplementary debentures on 7 March 1997 respectively to amend the terms of the second and third debentures.

The provisions of the debentures, so far as relevant to this summons, are these:

(1) at any time after the monies thereby secured shall have become payable:

(a) the bank or any person authorised by the bank may enter into and upon any land or premises where the assets of Rindaya thereby secured are and may take possession and control thereof (s. 8.01 of first debenture and of the amended second and third debentures as well);

(b) the bank may appoint any person to be receivers and/or managers of the properties thereby charged to it (s. 8.01(b) of first debenture and of the amended second and third debentures as well);

(2) the receivers and managers appointed by the bank shall be the agent of Rindaya and shall have power, *inter alia*:

(a) to take possession of or collect and get in all the properties of Rindaya;

(b) to carry on, manage or concur in carrying on or managing Rindaya's business;

(c) forthwith and without any restriction imposed by law or statute to sell or concur in selling all or any of the properties of Rindaya including but not limited to the said lands and such sale may be by way of private treaty;

(d) to do all such other acts and things as may be considered to be incidental or conducive to any of the matters or powers contained in the debenture and which the receivers and managers may or can lawfully do as agents of Rindaya (s. 8.02 of the first debenture and of the amended second and third debentures as well);

(3) the bank and any receivers and managers appointed by the bank were appointed as attorney or attorneys of Rindaya for Rindaya and in his or their own name or the name of Rindaya and on its behalf and as its act and deed to execute and deliver or otherwise perfect any deed assurance agreement instrument or act which may be required or may be deemed proper for any of the purposes stated in the debenture including but not

limited to the execution of the transfer of the said lands in the event of sale by private treaty (s. 9.01 of the first debenture and of the amended second and third debentures as well).

In May 2000 Rindaya ceased operations and soon thereafter, on 2 August 2000, the bank appointed the receivers and managers in respect of the assets, undertakings and properties of Rindaya. By that date, the total loan outstanding from Rindaya to the bank was approximately RM73,153,565.14.

Immediately on their appointment the receivers and managers took possession of the assets of Rindaya which were charged to the bank under the said debentures, including the said lands.

Purporting to act under their duties and powers, the receivers and managers took steps to sell the said lands. In May 2001, they caused the said lands to be advertised for sale in one publication in each of the following newspapers: the Sarawak Tribune, The Borneo Post, New Straits Times and Sin Chew Jit Poh. They also instructed a firm of registered valuers to value the said lands for purposes of sale. Following those instructions, the receivers and managers received a valuation report dated 20 November 2000 estimating the market value of the said lands at RM2,530,000 and their estimated forced sale value at RM1,950,000.

The only offer received by the receivers and managers for the said lands was for RM1,900,000 from Mr Lau Cheng Kiong. They then notified the directors of Rindaya by letters dated 16 May 2001 and 17 May 2001 about the offer received and invited the directors or any potential buyers to submit offers to purchase the said lands by 23 May 2001. No offers were received by the receivers and managers from the directors of Rindaya by that date except for a letter from a firm of advocates acting on the instructions of a director of Rindaya, objecting to the said lands being sold on the grounds that the bank had commenced a charge action to enforce their statutory right to sell the said lands under s. 148(2) of the SLC, but for which the bank has to date not obtained an order for sale.

On 13 September 2001 the receivers and managers entered into a conditional sale and purchase agreement in respect of the said lands with Mr Lau Cheng Kiong, the prospective purchaser, who appointed Blue Sky Shipping Sdn Bhd as his nominee for the transaction. The sale is conditional upon (*inter alia*) the consent from the bank to redeem the said lands and the receivers and managers obtaining the declaration sought in this summons. Hence this application.

As at 30 September 2001 there has been no winding-up petition presented against Rindaya and I was not informed of any change in that position when this summons was heard on 28 January 2002.

The question of substance which is raised for determination in this application is whether, in the exercise of the power conferred upon them under the terms of the debentures, the receivers and managers have the power and authority to sell the said lands even though they have been charged to the bank under the SLC. The question may be put in another way: Do the receivers and managers, relying on the provisions in the debentures, have the power and authority to sell the said lands without resorting to the procedure prescribed in the SLC for the sale of lands charged under it?

The answer to that question will depend upon whether the statutory provisions of the SLC regarding a judicial sale of charged land can be waived or contracted out of. In my judgment that question, although raised in the context of the National Land Code, has been answered by the Supreme Court in *Kimlin Housing Development Sdn Bhd v. Bank Bumiputra (M) Bhd* [1997] 3 CLJ 274. The facts of that case are that a company obtained banking facilities from a bank and as security for such facilities executed two charges under the National Land Code (hereafter 'the NLC') in favour of the bank. Subsequently, the company executed a debenture whereby it created a fixed and floating charge over its assets in favour of the bank. The debenture provided that at any time after the moneys secured by the debenture had become repayable the bank may appoint receivers and managers who would have power to sell any of the assets or properties of the company charged to the bank. Subsequently, the bank did appoint receivers and managers who wanted to exercise their powers under the debenture to sell the lands charged to the bank without resorting to proceedings under the NLC to obtain a judicial sale, but as there was no express provision in the debenture appointing them as attorneys of the company the receivers and managers applied to the High Court for leave to sell the lands. After the application for leave was filed, the company went into liquidation and the application of the receivers and managers was opposed by the liquidator.

The learned High Court judge before whom the application was heard arrived at two findings of law: (a) that the receivers and managers, relying on the powers conferred upon them by the debenture, were entitled to sell the lands charged without taking proceedings under the NLC to obtain a judicial sale; and (b) the fact that the company had been put into liquidation did not affect the securities held by the receivers and managers, at least, not until the secured creditor has been fully paid off.

On appeal, two questions of law were posed to the Supreme Court: (i) whether the receivers and managers were by virtue of the powers conferred upon them by the debenture entitled to sell the charged lands without taking proceedings under the NLC to obtain a judicial sale; and (ii) what was the impact of the winding up of the company on the receivership; in particular, on the powers of sale of the receivers and managers?

On the first question posed, it was contended on behalf of the bank that the learned High Court judge was right on the first point of law decided by him because the special agreement contained in the debenture conferred on the bank a conventional power of sale exercisable independent of the relevant provisions of the NLC. The Supreme Court rejected that contention and held that the receivers and managers were not entitled to sell the charged lands without taking proceedings under the NLC to obtain a judicial sale, and gave the following reasons (per Edgar Joseph Jr FCJ at pp. 297-298) for doing so:

> [T]he provisions of the Code (National Land Code) as to the rights of chargors are designed for their protection and cannot be waived; nor can the chargor contract himself out of the Code. It follows that no power of sale can be conferred by a chargor under the Code on a chargee himself by way of a debenture or power of attorney or otherwise, but proceedings must be brought by the chargee to obtain a judicial sale in accordance with the rigid procedure laid down in the Code. In such circumstances, any power of sale which purports to be conferred on a chargee himself, omitting all mention of notice and periods of default by a debenture or power of attorney and the necessity for obtaining a judicial sale would be invalid and ineffective to entitle a purchaser to be registered as owner.

And (at p. 299):

> "[T]he provisions of the Code setting out the rights and remedies of parties under a statutory charge over land comprised in Pt XVI are exhaustive and exclusive and any attempt at contracting out of those rights – unless expressly provided for in the Code – would be void as being contrary to public policy.

I am fully aware that *Kimlin*'s case concerned lands charged under the provisions of the NLC and that in arriving at its decision the Supreme Court had examined the relevant provisions of the NLC, but for reasons that appear hereafter it is my view that the principles stated in *Kimlin*'s case are equally applicable to lands charged under the provisions of the SLC.

In answering the first question of law posed to it in *Kimlin*'s case, the Supreme Court examined the law in three areas relevant to the question posed. The first two areas examined by the court related to 'the nature and characteristic of a charge under the (National Land) Code' and 'the rights and powers incidental to such a security'. In this part of its examination, the Supreme Court identified the essential difference between a common law mortgage and a statutory charge under the Torrens System in Malaya as being this: Under the common law mortgage, ownership or the legal estate in land is transferred to the mortgagee and only the right of redemption remains with the mortgagor; whereas, under a statutory charge under the Torrens System, ownership or the legal estate in land is never transferred to a chargee and always remained with the chargor. Following on from this essential difference, the court concluded

that whereas under a common law mortgage the mortgagee exercises rights and powers which are incidental to the legal or equitable estate vested in him as mortgagee; that same position does not pertain under a statutory charge under the NLC because under such a charge no legal estate vests in a chargee, with the result that any rights and powers which such a chargee exercises 'must flow from the relevant provisions of the Code with the charge taking effect as a security only, enforceable by proceedings in a court to obtain a judicial sale'.

In my judgment everything that was said by the Supreme Court about the essential difference between a common law mortgage and a statutory charge under the Torrens System as well as the rights and powers incidental to a statutory charge under the Torrens System is equally applicable to a statutory charge under the SLC, it being legislation which confers indefeasibility of title in accordance with the Torrens System (see *Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd* [1996] 2 CLJ 561, FC).

The third area of law examined by the Supreme Court in *Kimlin*'s case consisted of a study of the scheme of the relevant provisions of the NLC to determine whether the 'legislature was dealing exhaustively and exclusively with the powers of the statutory chargee as registered proprietor', or, as it was put in another way by Edgar Joseph Jr FCJ, 'whether the legislature intended that a chargor can – by the introduction of apt and sufficient words, whether in an annexure to the charge under the Code or a debenture – effectively confer upon his chargee a power of sale in addition to and independent of the powers conferred by the relevant provisions of the Code, and exercisable without the intervention of the court, thus bypassing, the machinery expressly provided by the Code in that behalf'.

In this part of its examination, the Supreme Court looked at the rights and obligations of a chargor and chargee under various provisions found in ss. 254-265 of the NLC and then gave nine reasons for concluding that those provisions conferred certain valuable rights upon chargors which were designed for their protection in proceedings brought under the NLC to enforce a statutory charge, none of which are possessed by a borrower under a debenture in common form and which led the Supreme Court to further conclude that the provisions of the NLC setting out the rights and remedies of parties under a statutory charge are exhaustive and exclusive and as those provisions are there to serve more broad public purposes as opposed to the exclusively personal rights of a chargor, they cannot be waived, nor can a chargor contract himself out of the relevant provisions of the NLC so as to defeat that purpose.

In my judgment an examination of the relevant provisions of the SLC show that they are no less exhaustive and exclusive and the rights and protection accorded to chargors thereunder are no less valuable and protective than those

which the Supreme Court found are accorded to chargors under the NLC, as the essential features in the NLC which were identified by the Supreme Court as affording chargors thereunder those valuable rights which were designed for their protection in proceedings taken under the NLC, are also found in the scheme under the relevant provisions of the SLC. Thus:

(i) the right of a chargor to be served a statutory notice in Form 16D under s. 254 of the NLC is also found in s. 148(1) of the SLC;

(ii) proceedings for sale directed by the NLC require judicial intervention (s. 256 NLC); so do proceedings for sale under the SLC (s. 148(2));

(iii) at the hearing of proceedings directed under the NLC the chargor has the right to be heard; so does a chargor under the SLC as the court 'after hearing the evidence' may make such order as in the circumstances seem just;

(iv) the terms to be included in an order for sale under the NLC include a sale by public auction at a date not less than a month from the date of order and at a reserve price (s. 257 NLC); so must an order for sale under the SLC (s. 150(1));

(v) in proceedings directed under the NLC the chargor has a right to be served a copy of the order for sale, for the sale to be advertised and for the chargee to prepare conditions of sale (s. 258 NLC); the like rights are conferred on a chargor in proceedings directed under the SLC (s. 150(1));

(vi) in proceedings directed under the NLC the sale is effected under the direction of an offer of the court who may seek the assistance of a licensed auctioneer; so too in proceedings directed under the SLC (s. 150(1));

(vii) in proceedings directed under the NLC the chargor has a right, at any time before the fall of the hammer to stop the sale by tendering the total sum due under the charge; so too in proceedings directed under the SLC (s. 145(1));

(viii) where a purchaser at a judicial sale under the NLC does not pay the balance of the purchase price by its due date, an extension must be sought from the court with the chargor being afforded a right to be heard on such application; so too in a sale under the SLC, where the conditions of sale which are settled by the court gives the Senior Assistant Registrar power to extend time (see *Malayan Banking Berhad v. Kueh Siew Pin* [2001] 6 CLJ 446 which followed and applied *M & J Frozen Food Sdn Bhd v. Siland Sdn Bhd & Anor* [1994] 2 CLJ 15 (SC));

(ix) a chargor has a right to set aside a judicial sale under the NLC where he can establish that the sale was conducted fraudulently, collusively or improperly to his prejudice; so too in a judicial sale under the SLC as s. 153 thereof only gives protection to a purchaser at a sale directed under the SLC, who has obtained a transfer of such land in good faith and for valuable consideration.

Applying the reasoning in *Kimlin*'s case, it must follow that the provisions found in ss. 145-153 of the SLC which confer certain valuable rights on chargors and which set out the rights and remedies of parties under a statutory charge under the SLC are there to serve more broad public purposes as opposed to the exclusively personal rights of a chargor and, therefore, cannot be waived nor can a chargor contract himself out of the relevant provisions of the SLC so as to defeat that purpose.

I have not overlooked the fact that in *Kimlin*'s case the court did say that any attempt by a chargor at contracting out of the rights accorded by the NLC would be void as being contrary to public policy "unless expressly provided for in the Code", but my examination of the SLC does not reveal any express provision allowing a contracting out of the statutory provisions relating to a charge under the SLC. Having said that, my attention has been drawn to s. 143 of the SLC which deals with forms of charges and which states, *inter alia*, that "any such charge may contain such other special conditions as may have been agreed to by the parties, but shall not contain a charge over property other than land or an estate or interest in land". I do not regard what was just quoted as an express provision allowing a contracting out of the rights of a chargor under the SLC as there is nothing in the language indicating so.

The question of substance raised in this application must, therefore, be decided against the receivers and managers, that is, that relying on the provisions in the debentures, they do not have the power and authority to sell the said lands without resorting to the procedure prescribed in the SLC. Accordingly, the receivers and managers are not entitled to the declaration sought in their main prayer in this application.

I now consider whether the receivers and managers are entitled to their alternative prayer which is that Rindaya, acting through the receivers and managers as its authorised agents, have power to sell the said lands without resorting to the procedure prescribed in the SLC for the sale of lands charged under it. I find that the receivers and managers are not entitled to their alternative declaration, and I say so for the following reasons.

In the first place, even if the receivers and managers are to be taken as acting as agents for Rindaya and, therefore, to all intents and purposes, this application is to be regarded as made by Rindaya, the fact remains that this

is an application made pursuant to the agreement reached between the parties in a debenture and the agency which the parties rely upon is contained in a debenture, the provisions of which are clearly an attempt at contracting out of the rights of parties under a statutory charge under the SLC and would, for the reasons earlier explained, be void as being contrary to public policy. Secondly, the same question was also considered by the court in *Sheno Paper Industries Sdn Bhd v. Pacidunia Sdn Bhd* [2000] 1 CLJ 320 where it was contended on behalf of receivers and managers that the decision in *Kimlin*'s case is not directed at a situation where a receiver and manager sells on behalf of the chargor any land that is charged under the Code. In rejecting that contention and holding that the decision in *Kimlin*'s case applied to the facts of that case so that any attempt by a chargor of land under the NLC to confer a right of sale under a debenture on receivers and managers without taking proceedings under the NLC to obtain a judicial sale would be void on ground of public policy as an attempt to contract out of the rights conferred by the NLC, the learned judge went on to say (at p. 329):

> It would, therefore, not have made any difference even had it been a case that was viewed as a case of a chargor himself wishing to sell by the agency of the receiver and manager. The sale would not have been allowed because public policy demands that the chargor be protected from his own deeds.

I respectfully agree with what was stated there.

Before concluding, I wish to deal with the decision in *Melantrans Sdn Bhd v. Carah Enterprise Sdn Bhd (in receivership) & Anor* [2000] 3 CLJ 127, where the Court of Appeal held that on the facts of the case before it, *Kimlin*'s case could be distinguished and, therefore, administrative receivers/managers who had been appointed under a debenture, the provisions of which regarded them as the authorised agents of the company with power to sell the assets of the company "are thus absolutely free and empowered to dispose of the assets of the company and their act binds the company".

In my view, quite apart from the fact that *Melantrans* case is distinguishable on its facts from our case, I find that although the facts of this case show that (a) Rindaya has not been wound-up, (b) the debenture empowers the receivers and managers appointed under its provisions to act as agents of Rindaya, (c) the debenture contains a validly constituted power of attorney clause, irrevocably appointing the receivers and managers the lawful attorney of Rindaya, I do not regard those facts as sufficient to prevent the principles stated in *Kimlin*'s case from being applied in this case because (i) although a winding-up had taken place in *Kimlin*'s case, that fact did not have any bearing on the Supreme Court's decision on the first question of law decided by it and this is made very clear at p. 299 of the judgment and the statement by the court that "On a further ground also, the borrower company is entitled to

succeed" ie, on the ground of winding-up; (ii) in *Kimlin*'s case the Supreme Court was well aware of the fact that the receivers and managers there, once appointed under the powers contained in the debenture in that case, were authorised to exercise all their powers as agents of the company. This is made clear from that passage in the judgment of the Supreme Court, where the powers of the receivers and managers under s. 8.04 of the debenture were set out; (iii) the fact that the receivers and managers were also constituted attorneys of the chargor would have made no difference to the decision in *Kimlin*'s case and this is made clear from that passage of the judgment of the court at p. 297-298 where after reviewing the provisions of the NLC to determine if the rights of chargors under the provisions of the NLC can be waived, the court said:

> It follows that no power of sale can be conferred by a chargor under the Code on a chargee himself by way of a debenture or power of attorney or otherwise, but proceedings must be brought by the chargee to obtain a judicial sale in accordance with the rigid procedure laid down in the Code.

In the result, it was for all the above reasons that I dismissed the application.